IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5549

MICHAEL TAYLOR,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals of Kentucky (Appendix, hereinafter designated App., pp. 54-58) is reported as *Taylor v. Commonwealth*, Ky. App., 551 S.W.2d 813 (1977).

JURISDICTION

The opinion of the Court of Appeals of Kentucky was entered on April 1, 1977. Petitioner's timely motion for discretionary review in the Supreme Court of Kentucky was denied on June 29, 1977 (App., p. 59). The mandate of the Court of Appeals of Kentucky was issued on July 11, 1977 (App., p. 60). The petition for writ of certiorari was granted on November 28, 1977. The jurisdiction of this Court is invoked on the basis of 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of his constitutional right to due process of law by the refusal of the trial court to give an instruction on the presumption of innocence when petitioner's counsel requested and tendered such an instruction.

2. Whether petitioner was denied his constitutional right to due process by the refusal of the trial court to give an instruction on the indictment's lack of evidentiary value when petitioner's counsel requested and tendered such an instruction.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Federal Constitution.

STATEMENT OF THE CASE

In March of 1976, Michael Taylor, the petitioner, was indicted by the Franklin Circuit Court Grand Jury in Frankfort, Kentucky for the offense of second degree robbery in violation of Kentucky Revised Statute (KRS) 515.030 (App., pp. 5-6).[1] According to the indictment, Mr. Taylor on or about February 16, 1976, committed second degree robbery "when, in the course of committing theft, he used physical force upon James Maddox" and "unlawfully took from Mr. Maddox a wallet containing ten ($10)-fifteen ($15) dollars and his house key" (App., p. 5).

Mr. Taylor on April 5, 1976 waived formal arraignment and entered a plea of not guilty to the charge in the indictment (App., p. 7).

Mr. Taylor's case was tried in Franklin Circuit Court on May 24, 1976 (App., pp. 9, 10, 15). During *voir dire* of the veniremen, the prosecutor explained, "Now, the prosecution has only one witness in this case and that's all we're ever required to have generally" (App., p. 16). The prosecutor then asked, "Would that fact

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[1] KRS 515.030 provides:

> (1) A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.
>
> (2) Robbery in the second degree is a Class C felony.

Under the Kentucky Penal Code, the authorized maximum term of imprisonment for a Class C felony is "not less than five years nor more than ten years." KRS 532.060(2)(c).

alone, the fact that there's only one witness for the prosecution, keep you from returning a verdict of guilty against the defendant if you believed the prosecution's witness?" (App., p. 16).

In the course of his *voir dire* of the potential jurors, trial defense counsel commented, "You all understand an indictment is only a charge, the initiating paper which brings us here today, and that in and of itself the indictment is no evidence, no way" (App., p. 17). Defense counsel added, "It's merely a document that gets us here to this stage in the proceedings. Do you understand that's not to be considered as evidence?" (App., p. 17).

Later in his *voir dire* of the jury, defense counsel addressed the presumption of innocence, asking whether the jurors agreed and understood that Michael Taylor "as he sits here today is a young man who is presumed to be innocent of the charge of second degree robbery" (App., p. 19).[2]

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[2] Defense counsel's reference to the presumption of innocence occurred in the following context:

> I'm sure you all will agree to this final question as regards the principle of doubt. Do each of you agree and understand that Michael Taylor as he sits here today is a young man who is presumed to be innocent of the charge of second degree robbery, that this innocence has to be overcome by the Commonwealth to meet a standard of what we call beyond a reasonable doubt and that in the event that at the conclusion of the evidence, you have a reasonable doubt then it is your duty to return a verdict of not guilty. Do each of you understand the principle of innocence, the requirement of reasonable doubt? That reasonable doubt must be removed in order to find a verdict of guilty? (App., p. 19).

Because two jurors were dismissed on peremptory challenges by the defense, two additional veniremen were called (App., pp. 19-20). Questioning these new jurors, the prosecutor recalled that the defense attorney had previously "advised that each defendant is presumed innocent until proven guilty beyond a reasonable doubt" (App., p. 20). The prosecuting attorney then asked, "If you serve in this case will you follow that rule of law?" (App., p. 20).

During defense counsel's questioning of the two new jurors, he asked, "Do both of you subscribe to the principle of law and *the Judge will instruct you* that the defendant is presumed innocent until proven guilty with sufficient proof to prove beyond a reasonable doubt for you to return a verdict of guilty" (App., p. 21; emphasis added).

After the jury was selected in the case at bar, the prosecutor presented his opening statement (App., p. 21). During his initial remarks to the jury, the prosecutor noted that "the essence of the evidence of the Commonwealth" would include that the alleged robbery victim "came down and took out the warrant and the Grand Jury returned this indictment" (App., p. 22). The prosecutor concluded by reading the indictment to the jury (App., p. 23). After petitioner's counsel addressed the jury briefly, the Commonwealth commenced its case (App., p. 24).

In an effort to prove the charged offense, the prosecution called but one witness, James Maddox, the victim of the alleged robbery (App., p. 24). Mr. Maddox, a fifty-one year old male, testified that he had resided in Frankfort for "about sixteen or seventeen years" and had known Mr. Taylor "about fifteen years"

(App., p. 25). Prior to the alleged robbery, Mr. Taylor had visited Mr. Maddox's house "about three times" (App., p. 25).

Mr. Maddox related that about 8:15 p.m. on February 16, 1976 petitioner came to his house and knocked on the door. When Mr. Maddox opened the door, petitioner allegedly said, "Let us in" (App., p. 26). Mr. Maddox retorted, "Boy, I got to go to bed. I got to get up early in the morning and go back to work" (App., p. 26). At that point, according to Mr. Maddox, petitioner, who was accompanied by a second unidentified person, responded "Okay" and the two unwelcomed visitors left (App., p. 26).

Approximately fifteen minutes later, these same two individuals "came back . . . knocked on the door again and said you ain't going to bed" (App., p. 26). They then proceeded to "push their way in" (App., p. 26). At that point Mr. Maddox supposedly "opened the door and let them in" (App., p. 26). When Mr. Maddox told his visitors he had "to go to bed," petitioner allegedly said, "No you ain't neither" (App., p. 26). Mr. Maddox responded, "Well, I'll call the police and get you out of my house" (App., p. 26). As Mr. Maddox "stepped out" his door, "this other boy" jumped on his back and petitioner allegedly hit Mr. Maddox "in the side of the head" (App., p. 26). After petitioner and "the other boy" allegedly pushed Mr. Maddox to the ground, petitioner took Mr. Maddox's pocketbook and key from his left pocket and both of the assailants "broke off running" (App., p. 26). Mr. Maddox added that he had "ten to fifteen dollars" in his wallet as well as various papers and a bus ticket (App., p. 27).

Mr. Maddox testified that after the incident occurred he called the police and reported the alleged offense (App., pp. 27-28). The prosecutor then elicited that Mr. Maddox had subsequently taken out a warrant against petitioner and had "appeared before the Franklin County Grand Jury to seek an indictment" (App., p. 28).

At the conclusion of the direct examination, Mr. Maddox explained that he did not know the other person who was with petitioner on the night in question (App., p. 28). The witness had never seen the other person before and had seen him but one time since the incident (App., p. 28). Under cross-examination, Mr. Maddox admitted that he has had petitioner, petitioner's friends, and other people that live in the project over to his apartment on occasion (App., p. 29). Mr. Maddox also acknowledged that he "provided beer" for these people (App., p. 29).

After Mr. Maddox was excused as a witness, the Commonwealth rested and petitioner's counsel moved for a directed verdict (App., p. 31). That motion was summarily overruled (App., p. 31).

Michael Taylor, the only defense witness, explained that he was twenty years of age and that he resided with his mother and stepfather in Frankfort, Kentucky (App., p. 32). He was employed at George's Restaurant and had been for six years (App., p. 32).

Mr. Taylor denied under oath that he had committed the acts which Mr. Maddox had described on the witness stand (App., p. 32). Although petitioner testified that he had known Mr. Maddox "about three or four years" and had been to his house "several times," he asserted that he had never struck Mr.

Maddox (App., pp. 32-33). According to petitioner, on the occasions he visited Mr. Maddox, he and the other people present "sat around and drank, watched television, played cards, talked . . . [and] different things" (App., p. 33).

Mr. Taylor acknowledged that "[m]aybe a few days before" the alleged robbery he had been at Mr. Maddox's apartment with Robert Chenault and with William Taylor, his brother (App., p. 33). However, petitioner adamantly denied being at Mr. Maddox's residence on February 16, 1976, the day of the alleged robbery (App., p. 33).

Mr. Taylor recalled that on Monday, February 16, 1976, he went to the restaurant about eleven o'clock in the morning and worked, cleaning up the premises (App., p. 33). When he left the restaurant, petitioner went to the college for awhile. After that, he returned to his home and "laid down for awhile" (App., pp. 33-34). About seven p.m., petitioner went out with two other fellows and they sat in a broken down car from about seven p.m. until approximately two o'clock the next morning (App., p. 34). The immovable car belonged to Robert Hayden, but petitioner's cousin, Robert Davis, as well as another man named Wade were with petitioner that night (App., p. 34).

During cross-examination, the prosecutor elicited that Michael Taylor had only a ninth grade education and earned but forty dollars a week by working part-time at the restaurant (App., pp. 35-36).

On re-direct examination, petitioner testified that he had been to Mr. Maddox's house since the incident, and Mr. Maddox had told him that "he didn't even remember who had been to his house" (App., p. 39).

After Mr. Taylor's testimony was completed, the defense rested (App., p. 39). Defense counsel then renewed his motion for a directed verdict, but again was overruled (App., p. 39).

During an in-chambers hearing on the instructions, petitioner's counsel objected to the trial court's refusal to give to the jury the instructions tendered by the defense (App., pp. 39-40). The instructions requested by the defense, but not given by the trial judge, included instructions on the presumption of innocence (Defense Instruction No. 4) and on the indictment's lack of evidentiary value (Defense Instruction No. 5).[3]

The presumption of innocence instruction requested by the defense reads as follows:

> The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a "clean slate". That is, with no evidence against him. The law permits nothing but legal evidence presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case (Defense Instruction No. 4; App., p. 53).

The defense instruction on the indictment's lack of evidentiary value states:

> The jury is instructed that an indictment is in no way evidence against the defendant and no adverse inference can be drawn against the

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[3]The instructions tendered by the defense were made appendices to the transcript of evidence (App., pp. 51-53).

> defendant from a finding of the indictment. The indictment is merely a written accusation charging the defendant with the commission of a crime. It has no probative force and carries with it no implication of guilt (Defense Instruction No. 5; App., p. 53).

During the *in camera* hearing on instructions, defense counsel obtained leave of court to dictate into the record at the conclusion of the trial the defense's formal objections pertinent to the instructions (App., p. 40).

The trial judge declined to give any presumption of innocence instruction and instead instructed the jury only on the substantive offense of second degree robbery, reasonable doubt, and the necessity of a unanimous verdict (App., p. 40).[4]

In the course of his closing argument, defense counsel emphasized the presumption of innocence and its application to the petitioner:

> As I indicated to you in the voire [sic] dire when we talked about the questions and answers at the very beginning, that you all subscribe to the principle of the presumption of innocence, that Michael Taylor is presumed innocent – and I

[4]The trial judge gave the following instruction on reasonable doubt:

> Number two, if upon the whole case you have a reasonable doubt as to the defendant's guilt you will find him not guilty. The term "reasonable doubt' as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty (App., p. 40).

> believe he is innocent – that that presumption remains with him throughout the trial. He has no burden to put on any proof and it is the, it's the obligation and responsibility of the Commonwealth to prove his guilt beyond a reasonable doubt (App., p. 43).

In response, the prosecutor, early in his summation, denigrated the presumption of innocence and defense counsel's use of that legal principle:

> This defendant, like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proven guilty beyond a reasonable doubt. That's just a presumption on his behalf . . . (App., p. 45).

Immediately thereafter the prosecutor asked the jurors to "[n]otice how the Court has defined for you in the instruction the term 'reasonable doubt' " (App., p. 45). The prosecutor recalled that the trial judge's instruction had defined reasonable doubt as "a substantial doubt, a big doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt the defendant is guilty" (App., p. 45).

In an endeavor to justify the lack of any evidence corroborating Mr. Maddox's testimony, the prosecutor explained to the jury:

> Well, this defendant is sharp enough he knows to get rid of the wallet and the things of that nature. You don't keep evidence of a crime around. One of the first things *defendants* do after they rip someone off, they get rid of the evidence as fast and as quickly as they can (App., p. 45; emphasis added).

At that juncture, the prosecutor opined that "[t]his is merely a case of contrast in a large sense" between "a very youthful defendant and a gentleman who is the complaining witness two and a half times his age" (App., p. 45). Continuing his description of the "contrast," the prosecutor told the jurors:

> You have one who pays for what he gets; the other who takes what he wants. You have one who respects the law and who works at it six days a week; you have another one who has no respect for the law (App., p. 45).

Moments later the prosecutor focused his attention on defendants in general and informed the jury that "they [defendants] like to come into court and play on your sympathy" (App., p. 46). Expanding on this theme, the prosecutor discoursed:

> They [defendants] don't want you to make your mind go back to the crime and to those events that took place. They want you to look at them and say well, I wouldn't do anything like that, you just know I wouldn't (App., p. 46).

Next the prosecutor argued that the "motive" for the robbery was "money" because Michael Taylor "was working part time over here at Spencer's Cafe cleaning up for just a few dollars a week" (App., p. 46).

The prosecutor advised the jury that in determining who is telling the truth they should ascertain "who would be most likely to tell you the truth" (App., p. 47). After explaining that Mr. Maddox had nothing to gain "by making a charge" against petitioner and "by coming to court," the prosecutor rhetorically asked, "What reason would he [Mr. Maddox] have to tell you other than the truth?" (App., p. 47). Then the

prosecutor proffered the following analysis of Michael Taylor's motivation:

> Now, look at this defendant. What reason would he have to tell you the truth? Not any because he knows if he tells you what he did you're going to give him what he deserves, a trip to the penitentiary (App., p. 47).

Concluding his argument, the prosecutor told the jury:

> In closing, he's got a very simple philosophy. This defendant says what's mine is mine; I will keep it. What's yours is mine; I will take it. That's not only his philosophy, that's what he practices. That's what he did . . . (App., p. 49).

Contrary to his plea, petitioner was found guilty of the charged offense and sentenced to confinement in the penitentiary for five years (App., pp. 9-10, 50). Final judgment was entered against petitioner on June 22, 1976 (App., p. 11). Notice of appeal was filed on June 24, 1976 (App., p. 13).

Petitioner in his direct appeal to the Court of Appeals of Kentucky, the state's intermediate appellate court, raised, *inter alia*, the trial court's failure to instruct on the presumption of innocence and the indictment's lack of evidentiary-value.

On April 1, 1977 the Kentucky Court of Appeals in a published opinion, with one judge dissenting, affirmed the conviction in petitioner's case, but remanded the case to the trial court for a resentencing due to the trial judge's failure to order the statutorily mandatory presentencing investigation (App., p. 56). Petitioner's timely motion for discretionary review as overruled by the Supreme Court of Kentucky on June 29, 1977. Consequently, the Court of Appeals of Kentucky on July 11, 1977 issued the mandate in petitioner's case.

SUMMARY OF ARGUMENT

I.

The presumption of innocence in favor of the accused, although not articulated in the Constitution, is a constitutionally rooted component of a fair trial in our criminal justice system. Due process guarantees the enforcement of the presumption of innocence in all criminal cases.

Despite the well established principle that a presumption of innocence in favor of the accused is constitutionally mandated, Michael Taylor's request for an instruction on the presumption was denied by the trial court. Kentucky's appellate courts have repeatedly sanctioned the denial of an instruction on the presumption of innocence.

By refusing the defense request for this instruction, the trial court in the instant case insured that Michael Taylor would be deprived of the protection this presumption affords anyone accused of crime.

Kentucky's contention that a trial judge may properly deny a defense request for an instruction on the presumption of innocence as long as the jury is instructed on reasonable doubt was rejected as early as 1895 by this Court. It has long been recognized by the federal courts, legal scholars, and numerous state courts that while the presumption of innocence is similar to the reasonable doubt standard in reminding the jury that the prosecutor bears the burden of proof, the functions of these two constitutional precepts are clearly distinguishable and independently necessary.

As universally recognized, an instruction on the presumption of innocence conveys to the jury a special meaning which affords the accused additional protection not contained in the rule concerning the burden of proof. The presumption performs a dual function in the criminal justice system. First, it serves to remind the jury that the prosecution bears the burden of persuasion which can only be met by proof establishing the accused's guilt beyond a reasonable doubt. Second, the presumption performs a purging function by cautioning the jury not only to remove from their minds all the suspicion which arises from the arrest, indictment, and arraignment, but also to reach their verdict solely on the basis of the evidence admitted at trial.

Precedent indicates that a trial court's failure to instruct on the presumption of innocence, when requested, constitutes reversible error without assessing any other factors in the trial. But under any test Michael Taylor's state conviction must be overturned since the trial judge's refusal to give the requested instruction violated his due process right to the presumption of innocence and so infected the entire trial that the resulting conviction violates due process.

Analysis of the other components of petitioner's trial demonstrates that the testimony of the witnesses, the argument of counsel, and even the instructions given by the judge magnified rather than minimized the prejudice inflicted on Michael Taylor by the court's refusal to give the defense requested instruction on the presumption of innocence. Obvious deficiencies in the trial court's instructions undermined Michael Taylor's right to the presumption of innocence until proven guilty

beyond a reasonable doubt. The prosecutor's closing argument vigorously assailed the presumption of innocence, defendants in general, petitioner's character, his youth, his economic status, his credibility, and even his personal philosophy (as postulated by the prosecutor). Deprived of a prophylactic instruction on the presumption of innocence, Michael Taylor was convicted by a jury that had been subjected to the prosecutor's discourse on an implicit theme – the presumption of guilt.

Ultimately, it is axiomatic that the fundamental protection of the presumption of innocence in favor of an accused will be eviscerated if trial judges are free, even in the face of a defense request, to refuse to instruct the jury on this legal principle.

Accordingly, the decision below to deny Michael Taylor the protection of an instruction on the presumption of innocence was plainly inconsistent with that constitutionally rooted principle and so infected his trial and conviction as to deny petitioner due process under the Fourteenth Amendment.

II.

To implement the fundamental protection of the presumption of innocence, due process requires that courts must be alert to factors that undermine the fairness of the fact-finding process in criminal trials.

Throughout the trial in the instant case the prosecution's overemphasis of the indictment, whether intentional or inadvertent, created the very real risk that the jury would erroneously view the indictment as

evidence of Michael Taylor's guilt of the charged offense. In this context, the trial judge's refusal to give the defense requested instruction on the indictment's lack of evidentiary value diluted the constitutional principle that guilt is to be established by probative evidence and beyond a reasonable doubt.

Courts justifiably have been concerned that overemphasis of the indictment may lead the jury to construe the indictment as evidence of guilt of the accused. Consequently, although the reading of the indictment to the jury is not an improper practice, a defendant in most jurisdictions is entitled, upon request, to an instruction that the indictment is only a formal charge and not evidence of guilt.

In the absence of an instruction on the presumption of innocence, the trial judge's decision to deprive Michael Taylor of the protection of an instruction on the indictment's lack of evidentiary value constituted a denial of due process, sufficient in magnitude to necessitate a reversal of petitioner's conviction.

AGRUMENT

I.

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION.

"The right of a fair trial is a fundamental liberty secured by the Fourteenth Amendment. . . . The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Long ago, this Court in *Coffin v. United States*, 156 U.S. 432 (1895), declared:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. *Id.*, 156 U.S. at 453, cited with approval in *Estelle v. Williams, supra.*

Indeed, the presumption of innocence is the "bedrock" principle of this country's criminal law. *In Re Winship*, 397 U.S. 358, 363 (1970).

The presumption of innocence "is predicated not upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the common law." *Reynolds v. United States*, 238 F.2d 460, 463 (9th Cir. 1956). The presumption of

innocence "is one of the fundamentals of the law" and "is not to be minimized or denied to any one accused of crime." *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928). It "was developed for the purpose of guarding against the conviction of an innocent person." *Reynolds v. United States, supra* at 463.

Despite the well established principle that a presumption of innocence in favor of the accused is constitutionally required, Michael Taylor's request to have the jury in his case instructed on the presumption was denied at the trial level and that denial was upheld by the appellate courts of Kentucky.

In the case *sub judice* the prosecution's only evidence was the uncorroborated testimony of one witness, Mr. Maddox, the victim of the alleged robbery, and the defense case consisted of but one witness, Michael Taylor, the defendant (App., pp. 24, 31). With the evidence in this posture, petitioner's counsel requested the trial judge to instruct on the presumption of innocence and tendered to the trial judge an instruction to that effect (App., pp. 39-40, 53).[5] The trial court

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[5]The presumption of innocence instruction tendered by defense counsel in the instant case reads as follows:

> The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a "clean slate". That is, with no evidence against him. The law permits nothing but legal evidence presented before a jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case (Defense Instruction No. 4; App., p. 53).

refused to give the "presumption of innocence" instruction tendered by the defense and limited its jury instructions to the substantive offense of second degree robbery, reasonable doubt, and the necessity of a unanimous verdict (App., pp. 39-40).

Rejecting on appeal the argument that Michael Taylor "was substantially prejudiced by the trial court's failure to instruct on presumption of innocence," the Kentucky Court of Appeals observed that "[t]he well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary." *Taylor v. Commonwealth*, Ky. App., 551 S.W.2d 813, 813-814 (1977). The Court of Appeals of Kentucky concluded, "We find no reason to change the established law on this point." *Id.* at 814.

In support of the contention that an instruction on reasonable doubt renders an instruction on the presumption of innocence "not necessary," the Court of Appeals of Kentucky cited the decisions in *Mink v. Commonwealth*, 228 Ky. 674, 15 S.W.2d 463 (1929), and *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942).

In *Mink v. Commonwealth*, 228 Ky. 674, 15 S.W.2d 463, 464 (1929), when the appellant "suggested that the trial court should have instructed the jury that the defendant was presumed to be innocent until his guilt was shown beyond a reasonable doubt," the Kentucky court rejected that argument because "[t]he usual instruction on reasonable doubt, substantially following the language . . .of the [Kentucky] Criminal Code, was given, and that was all to which the defendant was entitled." Citing *Brown v. Commonwealth*, 198 Ky.

663, 249 S.W. 777 (1923), the *Mink* court enunciated that "the court should not tell the jury that the law presumes the innocence of a defendant." *Mink v. Commonwealth, supra*, 15 S.W.2d at 464.

Significantly, in *Brown v. Commonwealth, supra*, the trial judge had given the following instruction on reasonable doubt: "The law presumes the defendant to be innocent until proven guilty, and, if you have a reasonable doubt of his having been so proven, you will find him not guilty." Although admitting that "this instruction fairly presents the law," the *Brown* court condemned its use because "it is more favorable to the defendant than he was entitled to have." *Id.*, 249 S.W. at 778.

In 1942 the Kentucky Court in *Swango v. Commonwealth, supra*, again found no error in the trial court's failure "to instruct the jury, in effect, that the law presumes the innocence of the accused." *Id.*, 165 S.W.2d at 183. Reasoning that "the only instruction of the character authorized is one as to reasonable doubt," the *Swango* court cautioned the trial judiciary that "an instruction such as suggested by appellant is unauthorized *as being too favorable to the defendant.*" *Id.* *See Commonwealth v. Stites*, 190 Ky. 402, 227 S.W. 574, 576 (1921).

Predicating its entire analysis on the rationale employed in prior state court decisions, the Kentucky Court of Appeals in the case *sub judice* affirmed the proposition that a trial judge in Kentucky may properly deny a defense request for an instruction on the presumption of innocence as long as the jury is instructed on reasonable doubt.

In 1895 this Court in *Coffin v. United States, supra*, analyzed the exact issue presented in this assignment of error. The trial judge in the cited case "refused to instruct as to the presumption of innocence," but "instructed fully on the subject of reasonable doubt." *Id.* at 453. The government argued on appeal that the reasonable doubt charge obviated the need for an instruction on the presumption of innocence. Consequently, the question presented in *Coffin* was "whether the charge that there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt so entirely embodies the statement of presumption of innocence as to justify the court in refusing, when requested, to inform the jury concerning the latter." *Id.* at 457. In holding that the refusal to give the requested instruction was reversible error, this Court explained:

> The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime. *Id.* at 460.

The requirement of a presumption of innocence charge was specifically reaffirmed in *Cochran v. United States*, 157 U.S. 286 (1895), when this Court explained:

> In the case under consideration, counsel asked for a specific instruction upon the defendants' presumption of innocence, and we think it should have been given. The Coffin Case is conclusive in this particular, and it results that the judgment of the court below must be reversed, and the case remanded, with instructions to grant a new trial. *Id.* at 300.

It should be noted that in *Coffin* this Court concluded that "the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf," while "reasonable doubt" is "the condition of mind produced by the proof resulting from the evidence in the cause." *Coffin v. United States, supra* at 460. According to the ratiocination in *Coffin*, reasonable doubt "is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises." *Id.* After describing the presumption of innocence as "a cause" and reasonable doubt as "an effect," this Court observed, "To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such an exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them." *Id.* This exact line of analysis was reiterated in *Cochran v. United States, supra* at 300.

However, the exposition and reasoning delineated in *Coffin* and repeated in *Cochran* was given little consideration and no mention in *Allen v. United States*, 164 U.S. 492, 500 (1896), where the alleged error centered on "the refusal of the court to charge the jury that where there is a probability of innocence, there is a reasonable doubt of guilt." This Court in *Allen* succinctly delimited the holding in *Coffin* to the principle "that a refusal of the court to charge the jury upon the subject of the presumption of innocence was not met by a charge that they could not convict unless the evidence showed guilt beyond a reasonable doubt."

Allen v. United States, supra at 500. Significantly, the trial judge in *Allen* had charged the jury that "a party starts into trial, though accused by the grand jury with the crime of murder, or any other crime, with the presumption of innocence in his favor" and that the presumption "is driven out of the case when the evidence shows beyond a reasonable doubt that . . . a crime has been committed." *Id.* Since the jury had been "charged upon the subject of the presumption of innocence," the trial court "could not be required to repeat the charge in a separate instruction at the request of the defendant." *Allen v. United States, supra* at 500.

By 1897 the analysis propounded in *Coffin* had generated a hybrid issue involving the defense's right to a specific charge on the presumption of innocence which described the presumption as evidence. In *Agnew v. United States,* 165 U.S. 36 (1897), the trial judge instructed the jury that "[t]he defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you" and that "[t]his presumption remains with the defendant until such time, in the progress of the case, that you are satisfied of the guilt beyond a reasonable doubt," but refused to give the following instruction requested by the defense:

> "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as a matter of evidence, to the benefit of which the party is entitled. This presumption is to be treated by you as evidence, giving rise to resulting proof, to the full extent of its legal efficacy." *Id.* at 51.

Rejecting the defendant's allegation of error, this Court in *Agnew* held that "[t]he instruction given was quite correct, and substantially covered the instruction refused." *Agnew v. United States, supra* at 51-52. Despite this summary dispatch of the assigned error, this Court gratuitously added that the trial court "might well have declined to give" the defense tendered instruction "on the ground of the tendency of its closing sentence to mislead." *Id.* at 52.

After quoting a passage from *Coffin* which designated the presumption of innocence to be "evidence in favor of the accused," the *Agnew* decision emphasized that in *Coffin* the trial court's charge "was thought not to have given due effect to the presumption of innocence" while in *Agnew* there "was no failure" of the trial judge "to state" the presumption of innocence to the jury. *Agnew v. United States, supra* at 52. This Court concluded that "the giving of the instruction asked would have tended to obscure what had already been made plain." *Id.*[6]

[6] According to Wigmore, after the *Coffin* decision declared the presumption of innocence to be evidence in favor of the accused, "[a] notable academic deliverance by the master in the law of Evidence, [Professor James Bradley Thayer], laid bare the fallacy with keen analysis" and "it was soon afterwards discarded in the Court of its origin." 9 J. WIGMORE, EVIDENCE §2511 (3rd ed. 1940).

Amplifying this comment, Wigmore observes that the opinion in *Agnew v. United States,* 165 U.S. 36 (1897), was "published subsequently to a notable lecture on the Presumption of Innocence, apropos of the Coffin case," delivered by Professor Thayer at Yale University in 1896. "in which the history of the presumption was carefully examined, its meaning acutely expounded and the fallacies of the Coffin case exposed in detail." 9 Wigmore, *Evidence* §2511 n.5. That lecture was reprinted in J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 551 app. B (1898).

Similarly in *Holt v. United States*, 218 U.S. 245, 253 (1910), the defendant excepted to the trial court's refusal to give a requested instruction which included the statement that "[t]he presumption of innocence is evidence in the defendant's favor." However, the trial judge had instructed the jury, "The law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is an innocent man." *Id.* This Court rejected the allegation of error, noting that the trial court's instruction "was correct, and avoided a tendency in the closing sentence quoted from the request to mislead." *Id.* at 253, citing with approval *Agnew v. United States*, *supra*. Here again this Court turned its back on the analysis and exposition of *Coffin* which had expressly classified that presumption of innocence as evidence in favor of the accused.

The decisions in *Agnew* and *Holt*, both *supra*, affirmed judicial refusal to instruct the jury in the language of *Coffin* that the presumption of innocence is evidence to be considered in the accused's favor. In both cases, the trial court had instructed the jury on the presumption of innocence, though not in the exact language requested by trial counsel. On appeal each defendant claimed error in the trial judge's refusal to instruct the jury to consider the presumption of innocence as evidence in favor of the accused. This Court in both *Agnew* and *Holt* held that an instruction, such as those requested, was unnecessary and at least potentially misleading. *United States v. Fernandez*, 496 F.2d 1294, 1298 (5th Cir. 1974). At least two federal circuit courts have interpreted the holdings in *Agnew* and *Holt* "as negating the statement in *Coffin* that the

presumption of innocence is evidence to be considered in favor of the accused." *United States v. Fernandez*, *supra* at 1298, citing *United States v. Nimerick*, 118 F.2d 464 (2nd Cir. 1941), and *Harrell v. United States*, 220 F.2d 516 (5th Cir. 1955).[7]

But the *Agnew* and *Holt* decisions have in no way undermined the basic holding of *Coffin* and its progeny that "the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime." *Coffin v. United States*, *supra* at 460-461. "Of unimpaired vitality is at least the *Coffin* holding that it is prejudicial error not to instruct on the presumption when requested." *United States v. Fernandez*, *supra* at 1298.[8]

As recently as 1976 this Court reiterated the teaching of *Coffin* that the "presumption of innocence" is "the undoubted law" and "its enforcement lies at the foundation of the administration of our criminal law." *Estelle v. Williams*, *supra* at 503, citing *Coffin v. United States*, *supra* at 453. Certainly the most basic mode of enforcing the presumption of innocence is to instruct the jury in every criminal trial of the presumption of innocence in favor of the accused. For as *Coffin* teaches, there exists an "inevitable tendency to obscure

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[7] Numerous state courts have rejected the concept that the presumption of innocence is evidence. *Commonwealth v. DeFrancesco*, 248 Mass. 9, 142 N.E. 749, 34 A.L.R. 937 (1924).

[8] At least one federal circuit has held that the failure to instruct *sua sponte* on the presumption of innocence can rise to the level of plain error requiring reversal. *McDonald v. United States*, 284 F.2d 232 (D.C. Cir. 1960).

the results of a truth, when the truth itself is forgotten or ignored." *Coffin v. United States, supra* at 460.

In 1895 this Court in *Coffin* held that a refusal to instruct the jury on the presumption of innocence "was not met by a charge" on the reasonable doubt standard of proof. *Allen v. United States, supra* at 500. That holding has remained viable. "[I]t is settled that failure to charge on the presumption of innocence is not cured by a correct charge on the burden of proof." *Dodson v. United States, supra* at 403.

Even those legal scholars who note technical imperfections in the concept recognize that the phrase "presumption of innocence" means that the prosecution must produce evidence to prove an accused guilty beyond a reasonable doubt. *Pitts v. State*, Md. App., 374 A.2d 632, 634 (1977). For example, Wigmore in his treatise writes that "[t]he 'presumption of innocence' is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, *i.e.*, the rule that it is for the prosecution to adduce evidence and to produce persuasion beyond a reasonable doubt." 9 J. WIGMORE, *supra* at 407. Although emphasizing that the presumption of innocence "says nothing" as to "the measure of persuasion," Wigmore notes that, as to the prosecutor's obligation to adduce evidence, the presumption "implies . . . that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure until the prosecution has taken up its burden and produced evidence and effected persuasion." *Id.* Ultimately, according to Wigmore, "to say . . . that the opponent of a claim or a charge is presumed not guilty is to say in another form that the proponent of the claim or charge must evidence it." *Id.*

McCormick, like Wigmore, has emphasized that since the "presumption of innocence" is not actually a presumption, the phrase is technically inaccurate. According to McCormick, "[a]ssignments of the burdens of proof prior to trial are not based on presumptions" because "[b]efore trial no evidence has been introduced from which other facts are to be inferred." McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §342 at 805 (2nd ed. 1972). Nevertheless, in certain instances, the rules assigning the burden of proof before trial "are incorrectly referred to as presumptions" and "the most glaring example of this mislabeling is the 'presumption of innocence' as the phrase is used in criminal cases." *Id.* McCormick reasons that "[t]he phrase is probably better called the 'assumption of innocence' in that it describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful." *Id.* at 805-806.[9]

Despite the technical inaccuracy of the phrase, McCormick acknowledges that the "presumption of innocence" has been utilized by judges "as a convenient introduction to the statement of the burdens upon the prosecution, first of producing evidence of the guilt of the accused and, second, of finally persuading the jury or judge of his guilt beyond a reasonable doubt." *Id.* at 806.

[9] "In the first place, the so-called presumption of innocence is not, strictly speaking, a presumption in the sense of an inference deduced from a given premise. It is more accurately an assumption which has for its purpose the placing of the burden of proof upon anyone who asserts any deviation from the socially desirable ideal of good moral conduct." *Carr v. State*, 192 Miss. 152, 4 So.2d 887, 888 (1941).

Notwithstanding these technical criticisms, both Wigmore and McCormick advocate the continued use of the phrase "presumption of innocence" because it "conveys to the jury a special meaning which affords the accused additional protection not contained in the rule concerning the burden of proof." *Pitts v. State*, *supra* at 635.

Wigmore advises that "in a criminal case the term [presumption of innocence] does convey a special and perhaps useful hint, over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." 9 J. WIGMORE, *supra* at 407.

Expanding this line of analysis, Wigmore explains that, while the presumption of innocence, like the rule about burden of proof, requires "the prosecution by evidence to convince the jury of the accused's guilt," the presumption also "conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i.e.*, no surmises based on the present situation of the accused." *Id.*, emphasis in original. In essence, then, the "presumption of innocence" instruction "is particularly a warning not to treat certain things improperly as evidence." *Id.* at 409. Realistically, Wigmore warns that "[t]his caution is indeed particularly needed in criminal cases." *Id.* at 407.

Assenting to Wigmore's evaluation, McCormick acknowledges the value of the "presumption of

innocence" instruction and concludes that "it should not be discarded" because "[l]ike the requirement of proof beyond a reasonable doubt, it at least indicates to the jury that if a mistake is to be made it should be made in favor of the accused." McCORMICK, *supra* at 806.[10]

Even Professor Thayer, in his 1896 lecture on the presumption of innocence, conceded that "it may be true, as a general proposition, that the right should be maintained to have the presumption of innocence, specifically, and by name, drawn to the attention of the jury" because "certainly" such a specific judicial declaration "would draw pointed attention to those dangers of injury to the accused from mere suspicion, prejudice, or distrust, and to those other grounds of policy which make such judicial warnings important." J. THAYER, *supra* at 572.

Another factor evidencing the fundamental nature of the presumption of innocence is the emphasis that state courts have placed on this legal precept. Numerous state appellate courts have recognized that the failure of the

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[10]This reflects a change in view from Dean McCormick's initial text where the author commented:

> It seems, however, that the standard instruction on the state's burden of proving the crime beyond a reasonable doubt amply covers these points. If not they should be covered specifically, and not by a phrase which can only suggest to a juror that there is some inherent probability that a person tried for a crime is innocent. The instruction on "presumption of innocence" should, it seems, be regarded merely as a traditional but unnecessary amplification of the instructions on the prosecution's burdens of evidence and of persuasion beyond a reasonable doubt. McCORMICK, THE LAW OF EVIDENCE 649 (1954).

trial judge to instruct on the presumption of innocence constitutes a constitutional error mandating reversal of the defendant's conviction.[11] For example, the Supreme Court of Appeals of West Virginia has proclaimed that "[i]t is a fundamental right of a defendant to have the jury instructed as to the presumption of innocence and we have repeatedly held it to be reversible error for a trial court to fail to do so." *State v. Cokeley*, W. Va., 226 S.E.2d 40, 43 (1976). Indeed, in Virginia, "[t]he failure of the trial court to adequately instruct the jury on the presumption of innocence when such an instruction is requested is reversible error." *Allen v. Commonwealth*, Va., 180 S.E.2d 513, 516 (1971); *Whaley v. Commonwealth*, Va., 200 S.E.2d 556 (1973).

Addressing this same question, the Supreme Court of Colorado, sitting en banc, observed that the "failure to instruct on the presumption of innocence constitutes a denial of due process of law" which "requires that the defendant be granted a new trial." *People v. Hill*, Colo., 512 P.2d 257, 258-259 (1973).

In Georgia, the failure of a trial judge in a criminal case to instruct the jury on the presumption of innocence is error requiring the grant of a new trial because "[t]his presumption is a fundamental protection afforded an accused and is based upon an established principle of common law." *Ealey v. State*, 141 Ga. App. 94, 232 S.E.2d 620, 620-621 (1977).

[11] "According to most courts, an instruction that the defendant's guilt must be established beyond a reasonable doubt is not regarded as the equivalent of an instruction on the presumption of innocence; and hence, if requested, the latter instruction must be given." 4 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE §541 at 20 (12th ed. 1976).

Noting that the presumption of innocence "is a cardinal principle which has special significance in criminal cases because of the nature of these proceedings," the Court of Appeals of New Mexico held "[i]t is error to fail to instruct the jury on the presumption of innocence, if defendant requests an instruction thereon." *State v. Henderson*, 81 N.M. 270, 466 P.2d 116, 118 (1970).

According to the Florida appellate courts, "any proper understanding of the State's burden of proof in a criminal case must begin with an appreciation of" the presumption of innocence. *Reynolds v. State*, Fla. App., 332 So.2d 27, 29 (1976). Consequently, the trial judge's failure to instruct completely on the presumption of innocence when requested required reversal of the defendant's conviction. *Id.*

Recognizing that the presumption of innocence is "fundamental to a fair trial," the Supreme Court of Washington held the complete failure of the trial court to instruct *sua sponte* on the presumption of innocence constituted reversible error. *State v. McHenry*, Wash., 558 P.2d 188, 190 (1977).

Because the presumption of innocence is a "cardinal principle" with "special significance in criminal cases," the Supreme Court of Illinois has recognized that "[i]t is error to fail to instruct the jury on this presumption" if requested. *People v. Long*, 407 Ill. 210, 95 N.E.2d 461, 463 (1950).

In Massachusetts the refusal to instruct on the presumption of innocence is reversible error even though the trial court instructs the jury that indictment and custody are not to be held against the defendant and that the verdict can not be based on suspicion.

Commonwealth v. Madeiros, 255 Mass. 304, 151 N.E. 297 (1926).

The Supreme Court of Alabama has consistently ruled that "in every criminal case . . . the presumption of innocence . . . should be fully presented in the oral charge." *Guenther v. State*, Ala., 213 So.2d 679, 684 (1968).

In Texas the trial court must charge as to the presumption of innocence when requested. *Bennett v. State*, Tex. Crim., 396 S.W.2d 875 (1965); *Brown v. State*, Tex. Crim., 396 S.W.2d 876 (1965). Texas courts have concluded that the presumption of innocence "is the most valuable of the defendant's rights and . . . that a charge upon this subject is essential in every criminal case." *Bennett v. State, supra.* Similarly the Supreme Court of Indiana has long held that a refusal to instruct on the presumption of innocence, when requested, denies an accused a fair trial and constitutes reversible error. *Jalbert v. State*, 200 Ind. 380, 165 N.E. 522, 523-524 (1928).

The following sampling of cases also support petitioner's contention: *People v. McClintic*, Mich., 160 N.W. 461 (1916); *People v. Leavitt*, 301 N.Y. 113, 92 N.E.2d 915 (1950); *State v. Stoddard*, Mont., 412 P.2d 827 (1966); *State v. Coleman*, Mo., 460 S.W.2d 719 (1970); and *Gilleylen v. State*, Miss., 255 So.2d 661 (1971).

The contention that instructions relating to reasonable doubt obviate the need for an instruction on presumption of innocence has also been rejected in numerous state courts. In *People v. Long, supra*, 95 N.E.2d at 463 the Supreme Court of Illinois explained that "in the absence of an instruction as to the

presumption of innocence, instructions relating to reasonable doubt of guilt have the effect of depriving a defendant of his presumption of innocence during the phase of the trial when the jury is considering all the evidence." Instructions pertaining to the reasonable-doubt standard "concern a degree of guilt, are not compatible with a presumption of innocence, and therefore, when standing alone, deprive a defendant of the presumption of innocence." *Id.* According to the *Long* court, this analysis is "the generally accepted view of both the Federal courts and the courts of last resort in other jurisdictions." *Id.*

Expressing this same rationale, the Supreme Court of Virginia has recognized that the "presumption of innocence is 'a landmark of the law' and, as such, is not sufficiently met by a reasonable doubt instruction." *Whaley v. Commonwealth, supra* at 558. *See State v. Henderson* and *People v. Hill*, both *supra.*

All of these factors coalesce to establish the presumption of innocence as a requirement of due process. Expressions in numerous opinions of this Court indicate that the presumption of innocence is the "bedrock" principle of "our criminal law." *In Re Winship*, 397 U.S. 358, 363 (1970). Legal scholars acknowledge the important and unique function of the presumption of innocence in a criminal trial. Even the various state courts accept the presumption of innocence as an essential legal principle and a fundamental protection of every accused.

The presumption of the innocence of an accused "attends him throughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt." *Kirby v. United*

States, 174 U.S. 47, 55 (1899). This presumption "continues to operate until overcome by proof of guilt beyond a reasonable doubt." *United States v. Fleischman*, 339 U.S. 349, 363 (1950). It "is not to be confused with the burden of proof, which is a rule affecting merely the time and manner of proof." *Id.*

While the presumption of innocence is similar to the reasonable doubt standard in reminding the jury that the prosecutor bears the burden of proof, their functions are both clearly distinguishable and independently necessary. In *United States v. Thaxton*, 483 F.2d 1071 (5th Cir. 1973), the court discussed this exact point:

> The presumption of innocence performs a two-fold function in our criminal process. First, as a corollary to the standard of proof in a criminal case, it serves to remind the jury that the prosecution bears the burden of persuading the fact-finder of the defendant's guilt beyond a reasonable doubt and that in the absence of such proof that the jury must acquit. Second, "it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." 9 Wigmore on Evidence §2511, at 407 (3d ed. 1940). *The charge usually given in both state and federal courts informs the jury of both the "persuasion" and "purging" functions of the presumption. Id.* at 1073; emphasis added.

The "purging" function of the presumption of innocence instruction was absolutely essential in the case *sub judice*. The evidence in the case at bar amounted to nothing more than one man's word against that of another. In such a situation, a jury may

discredit the testimony of the defendant simply because he is on trial. Indeed, the prosecutor in the case at bar even manipulated that potential prejudice in his closing argument when he said:

> Now, look at this defendant. What reason would he have to tell you the truth? Not any because he knows if he tells you what he did you're going to give him what he deserves, a trip to the penitentiary (App., p. 47).

Under these circumstances, petitioner was entitled to the protection of the "presumption of innocence" instruction. The failure to instruct the jury in the case *sub judice* on the "constitutionally rooted presumption of innocence" was a clear denial of due process. *Cool v. United States*, 409 U.S. 100, 104 (1972).

In his dissenting opinion in the case at bar, Judge Wilhoit criticized the majority's position on the presumption of innocence issue and offered the following explanation:

> It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 185 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. *Taylor v. Commonwealth, supra* at 814 (Wilhoit, J., dissenting).

Judge Wilhoit emphasized that since "[n]ot every person charged in a criminal complaint or indicted by a

grand jury is guilty of a crime . . . our system has built in certain safeguards to protect the innocent," one of which "is the so-called presumption of innocence of a criminal defendant." *Id.*

Noting the pragmatic implications of the presumption of innocence instruction, Judge Wilhoit observed:

> There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it. *Id.*

Although acknowledging that "an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do," Judge Wilhoit expressed his belief that "there is a subtle distinction between the two instructions and one does not completely perform the job of the other." *Id.* at 815 citing 9 J. WIGMORE, EVIDENCE §2511 (3d ed. 1940).

Petitioner notes that in the decisions of *Coffin* and *Cochran*, both *supra*, this Court held the trial court's failure to instruct on the presumption of innocence, when requested, constituted reversible error without assessing any other factors in the trial. Following this precedent, federal circuit courts have likewise reversed the defendant's conviction whenever the federal district judge has refused a defense request to instruct on the presumption of innocence without regard for other aspects of the case. The language of *Coffin* seems to indicate that reversal is inevitably mandated when a defendant's request for a presumption of innocence instruction is denied. *Coffin v. United States, supra* at 460.

Nevertheless, petitioner submits that under any test his state court conviction must be overturned since the trial court's refusal to give the requested instruction "violated" his right to the presumption of innocence "which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). Furthermore, that refusal to instruct on the presumption "so infected the entire trial that the resulting conviction violates due process." *Id.* at 147.

In determining the effect of either the inclusion or omission of an instruction on the validity of a criminal conviction, this Court has recognized "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten, supra* at 146-147 (1973), citing *Boyd v. United States*, 271 U.S. 104, 107 (1926); *Henderson v. Kibbe*, ____ U.S. ____, 97 S.Ct. 1730, 1736 n.10 (1977). This proposition "does not mean that an instruction by itself may never rise to the level of constitutional error." *Id.*, citing *Cool v. United States*, 409 U.S. 100 (1972). However, "it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp v. Naughten, supra* at 147. Consequently, "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Id.* at 147; *Henderson v. Kibbe, supra*, 97 S.Ct. at 1736 n.10.

"An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given." *Henderson v. Kibbe, supra*, 97 S.Ct. at 1736.

The instruction on the presumption of innocence submitted by Michael Taylor's trial attorney appears free of any improper or misleading statements of law. At no time did either the trial judge or the state appellate court suggest that the tendered instruction was rejected because it was defective. This is understandable since the tendered instruction is virtually a verbatim copy of the presumption of innocence charge contained in 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS §1101 at 205 (2d ed. 1970).[12] That particular form instruction was cited in *United States v. Thaxton, supra* at 1073 n.1, as an example of an approved instruction on the presumption of innocence. The defense tendered instruction does not appear susceptible to criticism on the basis of either language, construction or content.

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[12]The presumption of innocence instruction in 1 DEVITT & BLACKMAR, *supra* at 205 reads as follows:

> The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate" – with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case.

In the case at bar the instructions given by the trial judge were sparse. The trial court instructed on the substantive offense of second degree robbery, the definition of reasonable doubt, and the necessity of a unanimous verdict (App., p. 40).

The trial judge in the instant case commenced his instruction on the elements of the substantive offense with the direction, "you will find the defendant guilty under this instruction if and only if you believe from the evidence *beyond a reasonable doubt* all of the following" (App., p. 40; emphasis added). At no point in the remainder of the instruction on the substantive offense did the court mention the presumption of innocence or again refer to the reasonable doubt standard.

Next the trial judge gave a two-part reasonable doubt instruction. Initially the trial court informed the jury, "if upon the whole case you have *a reasonable doubt as to the defendant's guilt* you will find him not guilty" (App., p. 40; emphasis added). In the latter portion of this instruction, the trial judge defined the term "reasonable doubt" as "a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty" (App., p. 40).

Concluding his instructions, the trial judge explained that "the verdict of the jury must be unanimous" and "signed" by the foreman (App., p. 40).

Significantly, the trial judge's instructions never commented on the *prosecution's* burden of proving the defendant's guilt beyond a reasonable doubt. Instead, the jury was told to convict "if and only if" they

"believe[d] from the evidence beyond a reasonable doubt" the facts constituting the elements of the charged offense and to acquit "if upon the whole case" they had "a reasonable doubt as to the defendant's guilt" (App., p. 40). While the semantical constructions utilized by the trial court may not be constitutionally bankrupt in advising the jury of the due process guarantee of the reasonable-doubt standard, the phraseology employed did little to convey to the jury that it is the prosecution's duty "to adduce evidence and to produce persuasion beyond a reasonable doubt." 9 WIGMORE, *supra* §2511 at 407.

Obvious constitutional deficiencies in the trial court's definition of the term "reasonable doubt" undermined Michael Taylor's right to the presumption of innocence until proven guilty beyond a reasonable doubt.

The phrase "you must ask yourselves not whether a better case might have been proven" in a reasonable doubt instruction diminishes the protective validity of the reasonable doubt standard. This is particularly true since "[a]ll the authorities agree that to constitute a reasonable doubt there must be actual and substantial doubt of the defendant's guilt from the evidence, *or from a want of evidence.*" 30 AM JUR 2d EVIDENCE §1171, p. 351 (emphasis added). *See* 1 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE §12, at 18; *Holland v. United States*, 348 U.S. 121 (1954). This Court in *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972), judicially noted that "[n]umerous cases have defined a reasonable doubt as one ' "based on reason which arises from the evidence or lack of evidence." ' "

The definition of reasonable doubt given by the trial court below negated the universally accepted concept

that a reasonable doubt may arise from the lack or want of evidence in the case. By denying the jury the opportunity to ask themselves "whether a better case might have been proven" the court precluded the jury from arriving at a reasonable doubt if the evidence introduced at trial was of an unsatisfactory nature. Such a diminution of the constitutionally based "reasonable doubt" standard can not be sanctioned in a case where the trial judge expressly refuses a defense request for an instruction on the presumption of innocence.

Other courts have evaluated this type of definition of reasonable doubt and found it constitutionally lacking. For example, the Court of Appeals of Michigan in *People v. Davies*, Mich., 190 N.W.2d 694 (1971), condemned an instruction which likewise diminished the prophylactic nature of the reasonable doubt standard. The *Davies* court, after noting that "[a] reasonable doubt *may* arise 'from the lack, want or insufficiency of the evidence for the State' " concluded that "*it was error to instruct the jury*, as the judge did here, *that a reasonable doubt may not be based on the lack of evidence or the unsatisfactory nature of the evidence.*" *Id.* at 698 (emphasis supplied). *See State v. Blue*, 136 Mo. 41, 37 S.W. 796 (1896).

Admittedly the language used by the trial court below in defining reasonable doubt has been expressly approved by the appellate courts of Kentucky. *Merritt v. Commonwealth*, Ky., 386 S.W.2d 727, 729 (1965); *Whitaker v. Commonwealth*, Ky., 418 S.W.2d 750 (1967). Nevertheless, the conclusion is undeniable that such a definition by its very nature weakened the trial court's instruction that petitioner should be acquitted

"if upon the whole case" the jury has "a reasonable doubt as to the defendant's guilt" (App., p. 40).

Not only did this phrase in the definition diminish the validity of the protective reasonable-doubt standard but it also eviscerated petitioner's presumption of innocence in that it allowed the jury to overcome this fundamental presumption with less than satisfactory proof.

Although both trial defense counsel and the prosecutor referred to the "presumption of innocence" during *voir dire* of the jury and in their closing arguments, those references by counsel cannot be equated with a judicial charge advising the jury of the presumption of innocence and its function. Indeed, it is difficult to believe that the statements and arguments of counsel would have the same impact on the jurors as would an instruction. *People v. Donald*, 21 Ill. App.3d 696, 315 N.E.2d 904, 906 (1974).

This exact point was addressed in *United States v. Nelson*, 498 F.2d 1247 (5th Cir. 1974), where the defendants asserted on appeal that the trial court committed reversible error when it failed to instruct on the presumption of innocence. The court in *Nelson* was "not persuaded by the government's argument that references to the presumption by the court and counsel throughout the proceedings, from voir dire to closing argument, adequately apprised the jury of the presumption of innocence." *Id.* at 1248. Rejecting the government's argument, the *Nelson* court observed that "even continual references throughout the proceedings do not sufficiently remind the jury at the conclusion of the evidence" of the presumption of innocence and its function in a criminal trial. *Id.* at 1249.

As a preface to his instructions, the trial judge in the instant case told the jury, "*These are your instructions as to the law applicable* to the facts you've heard in evidence from the witness stand *in this case*" (App., p. 40; emphasis added). This remark clearly informed the jurors that the only law to be applied by them in Michael Taylor's case was that contained in the instructions presented by the judge. *See People v. Donald, supra*; this case also rejects the contention that the statements and arguments of counsel could fully inform the jury of the defendant's presumption of innocence and, consequently, obviate the need for an instruction on the presumption.

Even though trial defense counsel in the case at bar discussed the presumption of innocence during *voir dire* of the jurors, he expressly told the jury panel, "the Judge *will instruct* you that the defendant is presumed innocent until proven guilty . . . beyond a reasonable doubt" (App., p. 21; emphasis added). Consequently, when the trial judge's instructions contained no mention of the defendant's presumption of innocence, the jury obviously was skeptical of the emphasis petitioner's counsel had placed on that presumption during the trial. This factor also undermines any suggestion that the remarks of counsel in the instant case remedied the trial court's refusal to instruct on the presumption of innocence.

A defendant is "entitled to have the jury instructed as to the presumption of innocence at the time when they [are] given the other instructions in the case." *Dodson v. United States, supra* at 403. This is true for several reasons. First, "[j]urors understand that they are to be guided in their deliberations by the

instructions given them after the testimony is concluded." *Id.* Second, even "an instruction given at the beginning of the trial [not to mention statements of counsel during *voir dire*] is likely to be forgotten or misunderstood" by the jury. *Id.* Third, the jury might well conclude that statements of counsel or even a judicial charge "given at the beginning of the trial, and not along with the other instructions," is "not a matter which they [are] to consider in their deliberations." *Id.*

To assume in the case at bar that the jury afforded Michael Taylor the presumption of innocence is to engage in rank speculation. "[A] court presumes that the jury applies only the law of which it is informed by the judge." *Braley v. Gladden*, 403 F.2d 858, 860 (9th Cir. 1968). Consequently, "[c]ritical deficiencies cannot be supplied by inference or assumption as to the interpretation applied subjectively by twelve jurors, individually and collectively." *Id.*

Early in his summation, with knowledge that the trial court had declined to instruct the jury on the presumption of innocence, the prosecutor vigorously assailed the presumption:

> This defendant, like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proven guilty beyond a reasonable doubt. That's just a presumption on his behalf. . . (App., p. 45).

By equating the presumption of innocence with those defendants who had been tried, convicted, and sentenced to incarceration in the penal institutions of Kentucky, the prosecutor's argument sought to convince the jury that the presumption itself was more properly

associated with guilty defendants who had been tried and convicted in a court of law. Equally unfair was the argument's implication that the presumption of innocence itself was of no real consequence since it had not precluded the conviction and imprisonment of all those defendants who were at that time inmates of the state's correctional institutions.

Undoubtedly, the prosecutor's intentional denigration of the presumption of innocence was calculated to influence the jury to reject any presumption of innocence and, instead, to perceive Michael Taylor with suspicion and apprehension solely because of his status as a defendant.

After this disparagement of the presumption of innocence, the prosecutor addressed the "reasonable doubt" standard of proof and told the jury that the trial judge in his instruction had defined the term "reasonable doubt" as "a substantial doubt, *a big doubt*, a real doubt" (App., p. 45; emphasis added). Of course, an examination of the court's instruction reveals that reasonable doubt was never defined as "a big doubt" (App., p. 40). Not content with the prosecution-oriented instruction on the definition of reasonable doubt given by the trial court, the prosecutor elected to misquote the instruction and offer the phrase "a big doubt" as a synonym for "reasonable doubt." Certainly the prosecution's probability of obtaining petitioner's conviction was enhanced if one or more of the jurors substituted the phrase "a big doubt" for "reasonable doubt" in determining whether petitioner's guilt had been established in conformity with the proper standard of proof.

Throughout his closing argument, the prosecutor in the instant case maligned petitioner's character and, without any evidentiary predicate, implied petitioner was a seasoned criminal. Early in his argument the prosecutor commented, "this defendant is sharp enough he knows to get rid of the wallet and things of that nature" (App., p. 45). Continuing this theme, the prosecutor explained to the jury, "You don't keep evidence of a crime around" (App., p. 45). The impact of this line of argument in the instant case is dramatic. The prosecutor, keenly aware that he lacked any evidence – either physical or testimonial – to corroborate the testimony of his only witness, elected to argue to the jury that the *absence* of incriminating evidence against Michael Taylor was in actuality an indication that the defendant was a crafty and experienced criminal.

To add credence to this argument, the prosecutor advised the jury, "One of the first things *defendants* do after they rip someone off, they get rid of the evidence as fast and as quickly as they can" (App., p. 45; emphasis added). Of course, the prosecutor had introduced no evidence to this effect and was merely voicing his own opinion in the matter. More importantly, though, the prosecution had produced no evidence which would permit an inference that Michael Taylor had taken steps to divest himself of the proceeds of the charged crime. Finally, the comment itself revealed to the jury that the prosecutor had little or no respect for a defendant's presumption of innocence. Interestingly, the prosecutor used the word "defendants," not "criminals," when he expressed the idea that after a crime one of the first things the perpetrators do is to "get rid of the evidence."

Continuing his efforts to shore up the obvious weaknesses in his case, the prosecutor attempted to dwell on the "contrast" between the defendant and the complaining witness. Prefacing this argument, the prosecutor advised the jury that "[t]his is merely a case of contrast in a large sense" (App., p. 45). Focusing on the age difference, the prosecutor emphasized that the case involved "a very youthful defendant" and "a gentleman who is the complaining witness two and half times his age" (App., p. 45). By contrasting petitioner's status as a "defendant" and his extreme "youth" with the witness' status as a mature "gentleman," the prosecutor abused the presumption of innocence by insinuating that irrelevant factors such as age and status could be considered by the jury as indicia of guilt.

Next, without an iota of evidence to support his argument, the prosecutor told the jurors:

> You have one who pays for what he gets; *the other who takes what he wants.* You have one who respects the law and who works at it six days a week; *you have another one who has no respect for the law* (App., p. 45; emphasis added).

None of these remarks had any foundation in the evidence, yet the prosecutor emphatically asserted them to the jury. Undoubtedly, the ultimate effect of these remarks was to depict Michael Taylor as a professional criminal, while painting the prosecution's only witness as a hard-working, law-abiding citizen.[13]

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[13]In Kentucky a prosecutor's labeling of an accused as a "professional criminal," either explicitly or by innuendo, is highly improper and extremely prejudicial. *Lynch v. Commonwealth*, Ky., 472 S.W.2d 263 (1971).

It should be noted that the Kentucky Court of Appeals expressly found in the case at bar that "[i]n his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character." *Taylor v. Commonwealth, supra* at 814.

Moments later the prosecutor turned his criticism to defendants in general and informed the jurors that "they [defendants] like to come into court and play on your sympathy" (App., p. 46). Enlarging this concept, the prosecutor asserted, "They [defendants] don't want you to make your mind go back to the crime and to those events that took place" (App., p. 46). According to the prosecutor, defendants want the jurors "to look at them" and believe the defendants are incapable of committing crime (App., p. 46). Certainly the presumption of innocence has little vitality when a prosecutor can advise the jury that generally the accused in a criminal case is simply appealing to the jurors' sympathy and attempting to divert the jury's attention from the crime itself, while the trial judge can with impunity refuse a defense request for an instruction on the presumption of innocence.

Next the prosecutor averred that the "motive" for the robbery was "money" because Michael Taylor "was working part time . . . at Spencer's Cafe cleaning up for just a few dollars a week" (App., p. 46). Even though petitioner had testified that he earned forty dollars a week at his part-time job and lived at his parents' home, the prosecutor attempted to turn petitioner's economic status into a liability – a presumption of guilt based on a low weekly income. In the instant case the prosecutor adduced no evidence that Michael Taylor

was in need of additional funds or had voiced a desire to secure some easy money. Consequently, the prosecutor's theory was based solely on petitioner's economic status. It has been recognized that "where evidence of impecuniosity of a defendant may tend to prove motive or willingness to commit a crime . . . it should not be admitted and, as naturally follows, it should not be commented upon." *State v. Copeland,* 94 N.J. Super. 196, 227 A.2d 523, 526 (1967). Here petitioner had a part-time job, a regular weekly salary and a place to live; petitioner was certainly not impecunious. The prosecutor's perverted use of petitioner's part-time job and low salary mocked the constitutional guarantee of a presumption of innocence.

The prosecutor also advised the jury that to determine who is telling the truth they should ascertain "who would be most likely to tell you the truth" (App., p. 47). Emphasizing that Mr. Maddox had nothing to gain "by making a charge" against petitioner and "by coming to court," the prosecutor rhetorically asked, "What reason would he [Mr. Maddox] have to tell you other than the truth?" (App., p. 47). Assessing Michael Taylor's motivation, the prosecutor speculated:

> Now, look at this defendant. What reason would he have to tell you the truth? Not any because he knows if he tells you what he did you're going to give him what he deserves, a trip to the penitentiary. That's exactly what he's earned (App., p. 47).

Such an argument is undeniably premised on the theory that a defendant's testimonial protestations of innocence must be viewed as a lie simply because a defendant inevitably faces the possibility of conviction

and incarceration and, therefore, has a motive for denying his guilt. Certainly this type of argument by a prosecutor, even with its apparent fallacy, is not compatible with a defendant's constitutionally guaranteed presumption of innocence.

In the final moments of his closing argument, the prosecutor, building supposition upon speculation, professed knowledge of Michael Taylor's personal philosophy:

> In closing, he's got a very simple philosophy. This defendant says what's mine is mine; I will keep it. What's your is mine; I will take it. That's not only his philosophy, that's what he practices (App., p. 49).

Since the trial transcript contains no factual predicate for this argumentation, the prosecutor undoubtedly deduced his theory of petitioner's philosophy from the nature of the offense charged in the indictment – robbery. Postulating a course of conduct or a personal philosophy on the basis of an accusation in an indictment is not only improper argumentation, it is an affront to the presumption of innocence and the constitutional right to a fair trial.

Admittedly, the trial defense counsel did not object to the patent improprieties in the prosecutor's closing argument and this procedural defect by counsel precluded the possibility of reversal by the state appellate court on the basis of the prosecution's improper and prejudicial argument. *Taylor v. Commonwealth, supra* at 814. Nevertheless, the instances of improper argument by the prosecutor in the case *sub judice*, particularly those which conflicted with the presumption of innocence or the reasonable-doubt

standard of proof, must be evaluated to determine whether the other major components of petitioner's trial were conducted in conformity with the presumption of innocence.

Indeed, the "synergistic effect" of the combination of a "failure to charge on the presumption of innocence" *sua sponte* and a "prejudicial prosecutorial argument," presented without defense objection, has been held to be "fatal to the vitality" of a criminal conviction. *United States v. Fernandez, supra* at 1303. In the cited case the court reasoned that although the accused "was entitled to be tried with the presumption of innocence," he was "required to undergo trial in the face of argument by a representative of . . . his government, which strove to impose what amounted to a 'presumption of guilt.'" *Id.* That same "synergistic effect" has occurred in petitioner's case.

One other factor merits consideration. In his opening statement the prosecutor told the jury that the evidence for the prosecution would include proof that the robbery victim "took out" a warrant and the grand jury had returned an indictment against petitioner (App., p. 22). True to his word, the prosecutor, during his direct examination of the alleged robbery victim, elicited that the witness had both taken out a warrant against petitioner and had appeared before the local grand jury to seek an indictment in this matter (App., p. 28). By emphasizing that the prosecution's only witness had sought and obtained both a warrant and an indictment against petitioner, the prosecutor injected these irrelevant factors, complete with their accompanying stigma of suspicision, into the pool of evidence that the jury had to evaluate in determining Michael Taylor's guilt or

innocence. Such an overemphasis of the warrant and indictment is inconsistent with the constitutional guarantee of a presumption of innocence (see Argument II, *infra*).

A review of the other "components of the trial" in the case *sub judice* clearly demonstrates that the "testimony of witnesses, argument of counsel," and even "instruction of the jury by the judge" magnified rather than minimized the prejudice inflicted on Michael Taylor by the trial judge's refusal to give the defense requested instruction on the presumption of innocence. *Cupp v. Naughten, supra* at 147; *Henderson v. Kibbe, supra*, 97 S.Ct. at 1736 n.10.

In *People v. Dornblut*, 24 A.D.2d 639, 262 N.Y.S.2d 414 (1965), three of the five appellate judges on the panel, in a concurring opinion, lamented the probable demise of the presumption of innocence as a prophylactic right of the accused in a criminal trial. Because the presumption of innocence "has been such a fundamental concept of Anglo-American law," the concurring judges did "foresee *with regret* its disappearance from the criminal jury trial." *Id.*, 262 N.Y.S.2d at 416 (Christ, J., concurring); emphasis added. The three judges cautioned that "[i]f appellate courts do not insist that the historic presumption of innocence must be explicitly charged" and "called to the jury's attention, we will soon have dissipated and lost a great protective right of every defendant in a criminal case." *Id.*

Voicing that same concern, the dissenting judge in the case at bar observed that "[t]he law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it." *Taylor v. Commonwealth, supra* at 814 (Wilhoit, J., dissenting).

As long ago as 1895 this Court addressed this reality and enunicated that the "inevitable tendency to obscure" a "forgotten or ignored" truth "admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime." *Coffin v. United States, supra* at 460.

In the final analysis there exists no legal nor logical justification for a trial judge's refusal to give an instruction on the presumption of innocence, when such an instruction is requested. The instruction need neither confuse nor mislead the jury. Instead, the instruction implements a fundamental constitutional right, essential to the right of a fair trial and guaranteed by the Fourteenth Amendment.

Accordingly, the decision of the state appellate court in the instant case to deny Michael Taylor the protection of an instruction on the presumption of innocence was "plainly inconsistent with the constitutionally rooted presumption of innocence" and "so infected the entire trial that the resulting conviction violates due process." *Cool v. United States, supra; Cupp v. Naughten, supra.*

II.

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION.

After the jury was sworn, the trial judge, in the presence of the jury, told the prosecutor, "Mr. Corns, you may read the indictment and state your case" (App., p. 21). During his opening statement, the prosecutor told the jurors that "the essence of the evidence of the Commonwealth" would include that the robbery victim "came down and took out the warrant and the Grand Jury returned this indictment" (App., p. 22). At the conclusion of his brief opening remarks, the prosecutor informed the jury of the contents of the indictment:

> It's our duty at this time to read to you the indictment that sets forth the charge. Commonwealth of Kentucky versus Michael Taylor, Indictment Number 7844. The Grand Jury charges on or about the 16th day of February, 1976, in Franklin County, Kentucky, the above-named defendant did commit the offense of robbery in the second degree when in the course of committing theft he used physical force upon James Maddox at the latter's residence, 249 Rosewood, Frankfort, Kentucky, and the defendant unlawfully took from Mr. Maddox a wallet containing ten to fifteen dollars and his house key, against the peace and dignity of the Commonwealth of Kentucky, a

> True Bill, signed John M. Arnold, Foreman of the March, 1976, Franklin County Grand Jury (App., p. 23).

Later, during the prosecutor's questioning of James Maddox, the alleged robbery victim, the following colloquy occurred:

> Q. 35 Did you subsequently take out a warrant against Mike Taylor?
>
> A. Yeah.
>
> Q. 36 *And then you later appeared before the Franklin County Grand Jury to seek an indictment?*
>
> A. Yes, sir (App., p. 28; emphasis added).

By informing the jury that Mr. Maddox, the prosecution's only witness, had appeared before the Franklin County Grand Jury to seek an indictment, the prosecutor was able to convey to the jurors that the indictment of petitioner was an explicit affirmation by the grand jury of the veracity of Mr. Maddox's allegation that petitioner robbed him.

In view of the paucity of evidence against petitioner and the prosecutor's calculated emphasis of the grand jury's decision to indict petitioner on the basis of Mr. Maddox's testimony, defense counsel requested the trial judge to give the following instruction (App., pp. 39-40):

> The jury is instructed that an indictment is in no way any evidence against the defendant and no adverse inference can be drawn against the defendant. The indictment is merely a written accusation charging the defendant with the commission of a crime. It has no probative force and carries with it no implication of guilt (Defense Instruction No. 5; App., p. 53).

The trial court declined to give the requested instruction on the indictment's lack of evidentiary value (App., pp. 39-40).

After the jury returned its verdict, petitioner's counsel, by leave of court, expanded his prior objection to the trial judge's refusal to give the instruction on the indictment's lack of evidentiary value:

> The defendant objects to the failure of the Court to give tendered instruction number five which provides an instruction to the jury that the indictment which was read into evidence is in no way any evidence against the defendant and that no adverse inference can be drawn against the defendant from a finding of the indictment. The defendant states that the failure of the Court to so instruct the jury is prejudicial against the defendant because the jury is left free to consider the indictment as probative evidence just as any other evidence which they heard during the trial of this action and unless the jury is instructed that the indictment has no probative force and carries no implication of guilt then.the jury is left free to consider this evidence as it considers all other evidence which it received in the trial of this case (App., p. 51).

The Kentucky Court of Appeals summarily rejected petitioner's contention that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value, noting that they found "no merit" in petitioner's argument that "failure to give such an instruction denies the defendant due process of the law." *Taylor v. Commonwealth, supra* at 814.

This issue has been addressed by numerous federal courts. For example, in *United States v. Schanerman,*

150 F.2d 941 (3rd Cir. 1945), the court, in reversing a conviction for the trial judge's failure to give the jury an instruction on the indictment's lack of evidentiary value, observed:

> It seems settled that, where a correct proposition of law essential to the proper determination of an issue submitted to a jury is incorporated by the defendant into a requested special instruction, which is not covered in the general charge of the court, refusal to give the instruction is reversible error. [Citations omitted].
>
> When requested so to do, as in the instant case, the district court, in clear, unmistakable words, should have charged the jury that the finding of an indictment is no evidence of the guilt of the accused. *Id.* at 946.

Other decisions requiring an instruction on the evidentiary value of the indictment include: *Little v. United States,* 73 F.2d 861, 96 A.L.R. 889 (10th Cir. 1934); *Cooper v. United States,* 9 F.2d 216 (8th Cir. 1925); *Gold v. United States,* 102 F.2d 350 (3rd Cir. 1939); and *Whittlesey v. United States,* D.C., 221 A.2d 86 (1966).

Although the reading of the indictment to the jury is not an improper practice, a defendant in most jurisdictions is entitled, upon request, to an instruction that the indictment is only a formal charge and not evidence of guilt.

In *Kroll v. United States,* 433 F.2d 1282, 1287 (5th Cir. 1970), the defendant asserted on appeal "that it was error for the trial judge to read the indictment to the jury." The Fifth Circuit Court of Appeals rejected that allegation of error because:

> [t]he trial judge's instructions informed the jury that the indictment was not evidence, that it did not raise a suspicion of guilt, and that it was merely the method by which persons are charged and brought to trial. [Citations omitted.] *Id.* at 1287.

Similarly, in *United States v. Stroble*, 431 F.2d 1273, 1275 (6th Cir. 1970), the defendants had moved for a mistrial because, subsequent to the selection of the jury, but prior to the introduction of any evidence, "the [trial] judge had read the indictment to the prospective jurors." Answering this allegation of error, the Sixth Circuit Court of Appeals explained:

> Having at the time of the reading of the indictment, and in the general charge, thoroughly and properly instructed the jury as to the function of the indictment in a criminal case the court was correct in overruling the motion for a mistrial. *Id.* at 1275.

It is obvious that once the indictment is read to the jury, the defense, upon request, is entitled to an instruction which informs the jury that the indictment has no evidentiary value.

Within the context of Michael Taylor's trial, the defense instruction pertaining to the indictment was necessary to protect petitioner's constitutional right to a fair trial. The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Estelle v. Williams, supra* at 503.

After acknowledging that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice," this Court in *Estelle v. Williams, supra* at 503, articulated the methodology by which the presumption of innocence functions to insure no substantial deviation from the constitutionally mandated "fair trial." "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." *Id.* Reasoning from this premise, this Court concluded, "In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.*, citing *In re Winship*, 397 U.S. 358 (1970).

In the case at bar, the trial court's refusal to instruct the jury, in accordance with the defense request, that "an indictment is in no way any evidence against the defendant," that "no adverse inference can be drawn against the defendant from the finding of the indictment," that the indictment "is merely a written accusation," having "no probative force" and carrying "no implication of guilt," obviously diluted the constitutional principle that guilt must be established by probative evidence beyond a reasonable doubt. In the absence of the requested instruction, the jury was allowed to speculate that the grand jury's indictment was an explicit endorsement of Mr. Maddox's credibility and, hence, further evidence of petitioner's guilt. Under these circumstances, particularly in view of the sparsity of the prosecution's evidence, the trial court's refusal to give the "indictment" instruction was substantial error of constitutional dimension.

Certainly the circumstances of the case at bar dramatically demonstrate the necessity of the requested instruction to insure petitioner the due process

guarantee of a fair trial. Early in the trial the jurors had heard the trial judge direct the prosecutor to read the indictment to them (App., p. 21). Shortly thereafter the prosecutor, an elected official of their community, told them in his opening statement that the Commonwealth's evidence included the fact that the only prosecution witness had taken out the warrant in the case and the local grand jury had returned the indictment in question (App., p. 22). The prosecutor, stressing that he was performing a "duty," then read the entire indictment to the jury (App., p. 23). And finally, just as he predicted in his opening statement, the prosecutor elicited from the Commonwealth's only witness that he had taken out a warrant against Michael Taylor for the alleged crime and had appeared before the grand jury to seek an indictment (App., p. 28). This scenario reveals that the indictment that charged Michael Taylor with the robbery of Mr. Maddox undoubtedly assumed evidentiary proportions as petitioner's trial progressed. "[C]ourts justifiably have been concerned that overemphasis of the indictment may lead the jury to construe the indictment as evidence of guilt of the accused." *United States v. Press,* 336 F.2d 1003, 1016-17 (2nd Cir. 1964). For this reason, "the limiting instructions of the trial court are of particular importance." *Id.* at 1017. Consequently, the trial judge's refusal in the instant case to instruct on the indictment's lack of evidentiary value was "plainly inconsistent with the constitutionally rooted presumption of innocence." *Cool v. United States, supra* at 104.

Furthermore, in the instant case the trial judge not only refused to instruct on the indictment's lack of

evidentiary value, he also declined a defense request to instruct on the presumption of innocence. Without either an instruction on the presumption of innocence or an instruction declaring the indictment devoid of evidentiary value, the jury was free to utilize the numerous references to the indictment as evidence of petitioner's guilt. When the jury has no basis for distinguishing the indictment itself from the evidence admitted at trial, a defendant loses his constitutional guarantees of a presumption of innocence and conviction only upon proof beyond a reasonable doubt. Thus, the trial court's refusal to instruct on the indictment's lack of evidentiary value "violated" the presumption of innocence "which was guaranteed to the defendant by the Fourteenth Amendment" and "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten, supra* at 146, 147.

While it is true that the defense attorney questioned the jury about the indictment's lack of evidentiary value, his questions and statements were never given the status of law by the trial judge. Furthermore, trial defense counsel's *voir dire* of the jury (App., p. 17) occurred early in the trial before the prosecutor read the indictment to the jury (App., p. 23) and before the prosecutor elicited from the only prosecution witness that he had testified before the grand jury prior to the issuance of the indictment (App., p. 28). Under these circumstances, trial defense counsel's mere *voir dire* of the jury concerning the indictment's lack of probative value could never negate the need for the trial court to instruct the jury, as requested, that an indictment lacks any evidentiary value. *See People v. Donald, supra;*

United States v. Nelson, supra; Dodson v. United States, supra.

The overemphasis of the indictment, whether intentional or inadvertent, created the very real danger that the jury would erroneously construe the indictment as evidence of Michael Taylor's guilt of the charged offense. In this context, the requested instruction on the indictment's lack of evidentiary value was essential to insure "the fairness of the fact-finding process." *Estelle v. Williams, supra* at 503. The denial of the requested instruction diluted "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.* The trial court's refusal to give the instruction at bar was "plainly inconsistent with the constitutionally rooted presumption of innocence." *Cool v. United States, supra.*

In the absence of an instruction on the presumption of innocence, the trial judge's decision to deprive Michael Taylor of the protection of an instruction on the indictment's lack of evidentiary value constituted a denial of due process, sufficient in magnitude to necessitate a reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Kentucky affirming petitioner's conviction should be reversed upon either or both of the grounds delineated above.

Respectfully submitted,

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